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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 1264

GILES KAVANAGH, COLLECTOR OF INTERNAL REVENUE, PETITIONER

v.

J. H. NOBLE, RESPONDENT

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit

BRIEF OPPOSING THE GRANT OF THE WRIT

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The petitioner has not served the respondent with any copy of any grounds or reasons on which the petition is based, merely stating (Pet. p. 8), "All of the reasons for granting the writ relied upon in our petition in the latter case (*Jones v. Liberty Glass Company*) are equally applicable here."

The *Liberty Glass Company* case (involving $1,053.49) and the instant case are in some respects dissimilar. Here, there was not a failure to allow a taxpayer an allowable right, but a Regulation of the Commissioner approved by the Secretary of the Treasury (*Reg.* 86, *Art.* 117-5) sought to impose a tax on the gains of the husband from sales of capital assets which were exceeded by the losses of the wife from like sales.

though a joint return was filed, which was not a tax "imposed by this chapter" (*I.R.C. Sec.* 322). That Regulation was declared invalid by this Court in *Helvering v. Janney, et al,* 311 U. S. 189, and the next month this claim for refund was filed.

While not advised as to reasons on which the petition is based it is believed that no reasons could be assigned that would qualify under the rules and practices of the Court as sufficient upon which to base the issuance of the writ.

There has been no diversity of decisions of courts on the question here presented. Five District Courts and three Circuit Courts of Appeal, one of them—the Sixth—in two cases, have passed upon the question. These courts have been unanimous in holding that where money is collected illegally for a tax though the tax was not imposed by law the four year limitation for the filing of claims for refunds applies.

The unanimity of court decisions in construing the relevant statutes would indicate that there is not even any need to direct attention to the often announced principle that tax laws should be construed in favor of the taxpayer and particularly where the taxpayer is entitled to refund except for the bar of the statute of limitations.

The matter is not of general importance. In the more than thirty years of income tax litigation there are reported only five cases including the instant case in which the question has been at issue:

1. *Huntley v. Southern Oregon Sales, Inc.,* 102 F(2nd) 538 (C.C.A. 9), affirming the District Court.

With reference to this case the Solicitor General formally announced that no petition for certiorari would be filed (Prentice-Hall Federal Tax Service 1939, Vol. I, Section 4.35).

The opinion in that case contains an exhaustive historical analysis of the limitation sections, one applying to lawfully imposed taxes and the other to sums collected illegally.

2. *Olsen v. United States*, 32 Fed. Supp. 276 (D.C.S.D. Cal.).

In this case no appeal is reported to have been taken.

3. *U. S. v. Lederer Terminal Warehouse Co.*, 139 F(2nd)679 (C.C.A. 6), affirming the decision of the District Court.

4. *H. C. Jones, Collector, v. Liberty Glass Co.*, 159 F(2nd)316 (C.C.A. 10th), affirming the decision of the District Court reported in 66 F. Supp. 254.

5. *Giles Kavanagh, Collector v. J. H. Noble*, 160 F(2nd)104(2) (C.C.A. 6th), affirming the District Court, reported in 66 F. Supp. 258.

During the more than eight years following the very exhaustive opinion of the Circuit Court of Appeals for the Ninth Circuit in *Huntley vs. Southern Oregon Sales, Inc.* (*supra*) the Congress has enacted several revenut acts and several amendments but nowhere indicated any intention to change the laws applicable to refunds of excess payments of taxes lawfully imposed and of sums collected as for taxes but which had not been imposed by law.

Not only should the unanimity of the nine courts in construing these statutes seem to relieve the question

from any doubt, but the Congress itself since the insertion of the exceptive clause in Revised Statutes 3228 has specifically stated that Revised Statutes 3228 (Code Sec. 3313) does apply to income taxes.

The first time the exceptive clause appears in Revised Statutes 3228 was in *Section 1316 of the Revenue Act of* 1921 providing:

> "This section (R.S. Section 3228) except as modified by Sec. 252 shall apply retroactively to claims for refunds, etc."

The words "Section 252" of the Revenue Act of 1921 were changed in the 1924 Act to "Section 281" and in the 1926 Act to "Section 284" because of the change in section numbers of the various acts and then apparently to obviate the need for the continued change of section numbers the wording of the exceptive clause was changed to "except as otherwise provided by law in the case of income,—war profits, excess profits, estate and gift taxes".

In considering the 1923 Amendment to the Revenue Act of 1921, the Ways and Means Committee reported (*H. Rep.* 1424, 67*th Cong.*, 4*th Sess.*, p. 2) and the Senate Finance Committee adopted (*S. Rep.* 1137, 67*th Cong.*, 4*th Sess.*) and the Congress enacted as follows:

> "Where a tax has been paid under the provision of section 221 or 237 in excess of that properly due, any refund or credit made under the provisions of this section or section 3228 of the Revised Statutes shall be made to the withholding agent unless the amount of such tax was actually withheld by the withholding agent." 42 *U. S. Stat. at Large* 1504-5.

Thus the statute states that income taxes may be refundable under *Revised Statutes* 3228 (I.R.C. 3313). The Congress and the courts being in agreement there would seem to be no need for further judicial construction.

When the Congress desired to except all income taxes from the operation of any statute it had no difficulty in saying so. It was desired that *Code Section* 3312 should not apply to income, etc., taxes. Consequently that section reads: "Except in the case of income, etc., taxes—all internal revenue taxes shall, etc., be assessed within four years after such taxes became due - - - - ". Very different from *Code Section* 3313.

The fact that the Congress obviously took trouble to shift from one form of expression to another - - - to use one set of words instead of another - - - is another reason for assuming that they meant what they said and not what they did not say.

Respectfully submitted,

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Note: Copy of the petition in No. 1265, *Liberty Glass Co.* case, pursuant to request therefor, was furnished respondent's counsel after this brief was being printed, but it is not deemed necessary to amend or enlarge the brief.